IN THE

Supreme Court of the United States

October Term, 1958

No. 61.

JOHN H. CRUMADY,

Petitioner,

v.

"JOACHIM HENDRIK FISSER", her engines, tackle, apparel, etc. and JOACHIM HENDRIK FISSER and/or HENDRIK FISSER,

Respondents.

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

Opinions Below

The opinion of the District Court for the District of New Jersey is reported at 142 F. Supp. 389 (R. 14). The opinion of the Court of Appeals for the Third Circuit is recorded in 249 F. 2d 818 (R. 109). The opinion of the Court of Appeals on petition for rehearing is reported in 249 F. 2d 821 (R. 129).

Jurisdiction

The judgment of the Court of Appeals was entered on September 30, 1957 (R. 115). The order denying rehearing was entered on December 5, 1957 (R. 131). On Feb-

ruary 21, 1958, by order of Mr. Justice Brennan, the time within which to file a petition for writ of certiorari was extended to April 2, 1958. On February 27, 1958, by order of Mr. Justice Brennan, the time within which to file a petition for writ of certiorari was extended to May 2, 1958. The petition was filed on April 25, 1958, and it was granted on June 9, 1958. The jurisdiction of this court rests upon 28 U. S. C. Sec. 1254(1).

Questions Presented

1. When both courts below concur that the sole, active or primary or proximate cause of an accident to a longshoreman is the negligence of his fellow longshoreman, was the Court of Appeals correct in absolving the vessel of liability on the theory that a purported unseaworthy condition which the trial court held came into play by reason of such negligence was not the legal cause of the accident?

2. When an appliance on a vessel does not function as it is intended when the ship's gear is not employed for the purpose for which it is furnished, does it fail to meet the criterion of reasonable fitness which is prescribed by the doctrine of seaworthiness?

3. When an accident is caused by the negligence of a longshoreman's fellow employees, can the warranty of seaworthiness be extended so as to give the injured longshoreman a right to recover for a breach of warranty of seaworthiness although seamen traditionally had no such right and it would involve the circumvention of a statutory right?

4. When the conclusions of the trial court are inconsistent with its findings and the uncontroverted probative evidence and contrary to law, can the Court of Appeals properly reject the conclusions of the trial court?

Counterstatement of the Case

A counterstatement of the case is necessary because petitioner's statement makes it appear that his injuries were incurred as the result of a normal and proper unloading operation; whereas, in fact, both courts below found that this was not the case.[1] Petitioner also urges

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[1] "Despite testimony to the contrary given by libellant and his fellow employees, I am persuaded by the clear weight of the evidence that either the taking of the slack or the taking of a strain by the port winchman on the sling which was around the two timbers caused the inshore timber to turn or roll (rather than to slide) toward the offshore edge of the under lip of the starboard coaming, or otherwise to become jammed or drawn against the coaming edge, thus effectively blocking the further movement of the timber, and that the continued application of power to the winch imposed upon the topping-lift of the boom such an excessive strain as to cause it to break and the boom to fall" (R. 30).

"I conclude as a matter of law that Nacirema's negligence was the sole, active or primary cause of the parting of the topping-lift and the fall of the boom, with its consequent injuries to the libellant, by reason of the negligent manner in which Nacirema through its employees, attempted to extract the timber from its obstructed position beneath the deck of the vessel" (R. 33).

"The court also found quite properly that Nacirema's employees, libellant's fellow stevedores, were negligent in their conduct of the unloading operation. More particularly, attempting to lift long and heavy timber from the hold they permitted the load to catch under the coaming at the margin of the hatch from which it was being removed" (R. 111).

"It was a proper finding that the negligence of the stevedores was 'the sole active or primary cause' of the parting of the gear. But we think it is equally clear that the court erred in the next step of its reasoning, that this negligence of Nacirema 'brought into play the unseaworthy condition of the vessel.' The concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose. Applied to the present facts, this means that the setting of the electrical circuit breaker could make the gear unseaworthy only if there was reason to fear that a strain of about six tons on the running gear, which would activate the cut off, would subject cable of fifteen ton capacity in the topping-lift to a dangerous strain. There is nothing in this record which suggests that such an eventuality was reasonably to be feared or anticipated. Thus, the gear was not proved to have been unseaworthy, neither was the setting of the cut off device established as a legal cause of the accident which occurred" (R. 113-114).

that the excessive strain on the topping lift was produced by the position in which the longshoremen had reset the boom, whereas both courts below concurred that "the proximate cause" or the "sole, active or primary cause" of the overstrain on the ship's gear and the consequent breaking of the topping lift and the fall of the boom resulted in the negligent attempt of the longshoremen to extract a timber which they had caused to become jammed against the underedge of the hatch coaming *by continuing to apply power to the ship's winch* AFTER further movement of this timber had been effectively blocked.[2] Finally it is contended, even though the attempt by the longshoremen to extract the obstructed timber by continuing to apply the power to the ship's winch was the sole, active or primary cause of the accident, that an electromagnetic device (circuit breaker) which was set to operate in accordance with recommended practice and a Coast Guard regulation nevertheless rendered the vessel unseaworthy because the setting was not such as would have prevented the occurrence of the accident even though that was not the purpose of the circuit breaker, the longshoremen did not know of its existence and it was not the purpose for which it was intended or installed.

Thus, petitioner's statements and arguments are not reliable guides to the proceedings below because they do not set forth all the facts which are material to a proper consideration of this case, they omit and fail to give any consideration whatsoever to what both concurred was the sole or proximate cause of petitioner's accident and they seek to spell out a liability which, as a matter of law, does not exist on the basis of a purported failure of a ship's appliance to perform a function for which it was not intended, designed or furnished.

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[2] Ibid.

There is no dispute that on January 2, 1954 the *SS Joachim Hendrik Fisser* arrived at Port Newark, New Jersey, with a cargo of lumber and timbers and that Nacirema Operating Company, the petitioner's employer, was engaged pursuant to a written contract to discharge this cargo from the *SS Joachim Hendrik Fisser* (R. 96-103). For the purpose of discharging the #1 hatch, the longshoremen were provided with two electric winches and two booms forward of #1 hatch as well as the customary appurtenances.

Each of the booms contained the customary marking at the heel thereof which, in accordance with international practice, was notice to the longshoremen that they were not to attempt to lift loads heavier than three tons with this gear of the ship (R. 44-45). These booms were supported by a wire rope called a topping lift in a double purchase arrangement which, according to the findings of the trial court (concurred in by the Court of Appeals), was adequate and proper for the loads for which the rest of the gear was designed and intended (R. 26) and had a safe working load of at least three tons (R. 25).

The power for each winch was supplied by an electric motor which had a rated capacity of 18 German horsepower. Transmission of power from the electric motor was controlled by a manual lever on the winch. When the winch operator pushed the lever away from himself, the winch would raise the draft. When the lever was pulled by the winch operator toward himself, the lifting operation would be reversed and the draft would be lowered. By placing the lever in a vertical position, the winch would stop turning (R. 27). In addition to this manual control, the winch was equipped with a switch by means of which the power to the winch could be shut off by the winch operator. The winch operator who had

operated the winch for an hour before the accident was shown this switch when he started to operate the winch and told what its function was (R. 29).

In order to protect each of the electric motors from burning out in the event excessive current should be built up and to act as a fuse and not a governor (R. 41-44), each of the motors was equipped with an electromagnetic instantaneous type of circuit breaker. The circuit breakers were located in a locker in the forepart of the mast house forward of the winches (R. 69-72). The winch operator did not know of their existence (R. 29) and had nothing to do with them insofar as operating the winch was concerned (R. 69-72). In order to overcome inertia, friction and the normal circumstances of operation when lifting a load (this is a fundamental law of physics), it was necessary to set the circuit breaker so that sufficient current could be generated to lift the load for which the lifting gear was designed. In view of this, according to our Coast Guard regulations[3] and based on accepted practice, it was proper to set such electromagnetic cut-off device so that the strain on the runner lifting the draft would be greater than the weight to be lifted (R. 45-46, 49-51, 90-91).

On the date of petitioner's accident, petitioner and his fellow workers came on board and discharged lumber and timber from the #1 hatch with the gear rigged in the manner the ship's crew had set it up. The discharging was done in the following fashion: The longshoremen first made up a draft of lumber or timber in the hatch and

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[3] Coast Guard Regulation 46 C. F. R. Part 111.45-20(b2) allowed a setting up to 250% of full load current. 250% of full load current allows a load on the runner of 7½ tons. The point at which the circuit breaker in question was set was equivalent to a full load current of a little over 6 tons, which was well within the maximum prescribed by the United States Coast Guard.

placed wire slings around it. They then hooked the two wire falls which were joined at the lifting end to the slings which were around the draft—one wire fall ran through a block which was at the head of the starboard (burton) boom which had been rigged over the deck and down through a block at the foot of the starboard (burton) boom and around the drum of the starboard winch, and the other passed through a block at the head of the port (up-and-down) boom which was over a point in the center line of the hatch square of #1 hatch, down through a block at the foot of the port (up-and-down) boom and around the drum of the port winch. By first applying the power to the port winch, the draft was raised upward and out of the hatch and then by applying the power of the starboard winch, the draft was transported across the deck of the vessel and lowered down onto the pier by reversing the raising operation and letting up on the runners. There was no claim or evidence in the case that the ship's winches could not be operated properly by means of the manual lever which was furnished for this purpose.

After working in this manner for approximately one hour and just immediately prior to the occurrence of petitioner's accident, the longshoremen, apparently in order to establish a more lateral pull for removing timber from under deck, switched the position of the port (up-and-down) boom so that the head of the boom was then above and perpendicular to a point on the vessel's deck two feet to the port of the port coaming of #1 hatch.

Immediately after the port (up-and-down) boom was moved into this position, the longshoremen attempted to lift two timbers, which measured from 8" x 8" to 12" x 12" in girth and from 30 to 37 feet in length, from the vicinity of the starboard side of the hatch. One of these timbers lay in the open square of the hatch just

outside the starboard hatch coaming. The other timber lay about two feet to the starboard main deck and just inside the lower projection of the starboard vertical coaming (on the inshore side).

The libelant and a fellow employee placed a double-eyed wire rope sling around these two timbers at a point some two or three feet from the after ends of these two timbers and the two eyes of the sling were then placed upon the cargo hook of the fall which extended from the head of the port (up-and-down) boom in a diagonal towards the starboard after end of the hatch where this sling around the timbers was located. As soon as this was done, libelant's co-worker gave two signals to the port (up-and-down) winchman. The first was to take up the slack on the fall. After that was done, a second signal was given to lift the timbers. According to the trial court it found that the following occurred:

> "* * *, either the taking of the slack or the taking of the strain by the port winchman on the sling which was around the two timbers caused the inshore timber to turn or roll (rather than slide) toward the off shore edge of the underlip of the starboard coaming, or otherwise to become jammed or drawn against the coaming edge, thus effectively blocking the further movement of the timber, and that the continued application of power to the winch imposed upon the topping lift of the boom such an excessive strain as to cause it to break and the boom to fall" (R. 30).

Petitioner nonetheless sued the vessel *in rem* on the sole theory that his accident occurred because the topping lift cable was defective (R. 110-111). To that end petitioner produced numerous witnesses and exhibits. Amongst these exhibits were two pieces of obviously defective wire

rope (L. 10, L. 13) which were not of the same size as the topping lift wire with which the trial court found the vessel was equipped at the time (R. 38, 39) and which were identified by the vessel's Mate as being nothing more than pieces of the mooring line left over from mooring line repairs (R. 17-24). Further exhibits consisted of photographs purportedly taken of Exhibit L. 13 after it broke but before it was severed from the topping lift cable as it hung from the mast of the vessel. The witness who purportedly severed Exhibit L. 13 from the topping lift admitted that he had removed L. 13 from the vessel before photographs of it were taken (R. 17-24).

The trial court rejected libelant's evidence in toto and found that:

> "* * * *the topping lift and its manner of rigging, which was in use just prior to the fall of the boom, was adequate and proper for the loads for which the rest of the gear was designed and intended*" (R. 26) (Italics supplied).

Having eliminated the only basis of liability which petitioner sought to prove on the trial by having found that not only the topping lift but the manner of rigging in use just prior to the fall of the boom was adequate and proper for the loads for which the rest of the gear was designed and intended, and having concluded that the overstrain on the topping lift was produced by the continued application of power to the winch by the longshoremen after the timber had become jammed, the trial court "formulated a new theory of liability" and held the vessel liable on the ground that the negligence of the longshoremen in the manner in which they tried to force the blocked timber brought into play an unseaworthy condition of the vessel for which it believed the vessel was liable to peti-

tioner, for which liability, however, it was required to be indemnified by Nacirema Operating Company, the petitioner's employer.

Nacirema's obligation to indemnify was predicated on the theory that since its negligence in attempting to extract the timber from the obstructed position beneath the deck of the vessel was the sole, active or primary cause of the overstrain on the topping lift, Nacirema violated a duty which it owed to the vessel to exercise reasonable care in conducting the unloading operations and was, therefore, obliged to reimburse the vessel for any damages it was required to pay.

The liability of the vessel was predicated on the conclusion that the setting of the winch cut-off device at the time the winch was turned over to libelant and his fellow employees for operation rendered the vessel unseaworthy (R. 32). In arriving at this conclusion, the trial court did not indicate on what it based this conclusion. It pointed out that there was uncontradicted evidence that after the accident had occurred, inspection by the ship's Chief Officer disclosed that the cut-off had functioned and that the winch operated perfectly. It also noted that the cut-off device was susceptible of being so adjusted as to operate automatically at different degrees of excess load on the gear. It then further noted that apparently the cut-off device was set to function at a much lighter load than was imposed upon the gear although it was set to operate at a load slightly more than twice the safe working load of the topping lift (R. 31-32).

On appeal by all of the parties, the Court of Appeals reversed the trial court and dismissed the libel. Because of this disposition, the Court of Appeals did not consider the grounds urged by petitioner for reversal of the trial court nor those advanced by Nacirema Operating Company.

In its opinion, the Court of Appeals concurred with the trial court that the proximate cause or the sole, active or primary cause of petitioner's accident was the negligence of the longshoremen in the manner in which they attempted to use the ship's discharging gear after they had caused a timber to become obstructed against the under edge of the vessel's hatch coaming. It disagreed with the trial court that on the basis of the facts of this case there was any legal basis for holding the vessel liable to the petitioner. The Court of Appeals pointed out that in view of the fact that the cut-off device was set in accordance with the standard prescribed by the United States Coast Guard for the setting of such a control, and since the application of mathematics showed that subjecting a cargo runner whose safe working load was three tons to a strain of six tons did not in itself create any undue risk of breakage,[4] there was no basis, in the absence of any showing that there was reason to fear that the gear would be subjected to a dangerous strain, to hold that the vessel's gear was unseaworthy or that it was the legal cause of the accident. The Court of Appeals accordingly absolved the vessel and reversed the trial court on the law because it found, as the trial court did, that the proximate cause of the accident was the negligence of the longshoremen, that the accident occurred while the longshoremen were using the ship's gear in a manner and for a purpose for which it was not furnished. While the Court of Appeals took note of the fact that by changing the position of the head of the boom the longshoremen made it possible for greater strain

[4] The mathematical calculations are set forth in Exhibit IR-4 which was computed by the expert Stewart and Exhibits IR-5, IR-6 and IR-7 which were computed by the expert Simons. The laws of physics teach that inertia, friction and the normal circumstances of operation make it necessary that substantially more than a three-ton strain be imposed upon the gear before a three-ton load can be lifted.

to be translated to the topping lift rather than some other part of the gear, this nevertheless did not render the vessel unseaworthy in the absence of any indication that the longshoremen would subject the ship's gear to a strain greater than that presented by a normal lifting operation, which was presented by applying the power to the winch after the movement of the timber they were trying to discharge had become effectively blocked. In this connection, it said:

> "The concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose. Applied to the present facts, this means that the setting of the electrical circuit breaker could make the gear unseaworthy only if there was reason to fear that a strain of about six tons on the running gear, which would activate the cut off, would subject cable of fifteen ton capacity in the topping-lift to a dangerous strain. There is nothing in this record which suggests that such an eventuality was reasonably to be feared or anticipated. * * *" (R. 113-114).

Petitioner thereupon filed a petition for rehearing. On this application for the first time, petitioner contended that the shifting of the boom rendered the vessel unseaworthy and that that was the sole cause of the accident. He also advanced the new theory that the negligence of the longshoremen amounted to incompetence and that such incompetence also rendered the vessel unseaworthy.

Also, for the first time, although the trial of this action lasted from March 1 to April 12, 1956, petitioner attempted to challenge the Coast Guard regulation which governed the setting of such a cut-off device as was involved in this action. While it is contrary to the uncontroverted evidence in this case and has no support in the record, peti-

tioner, by means of incompetent and self-serving declarations in a footnote (R. 124), sought to destroy the existence, efficacy and application of this Coast Guard regulation to this case. This footnote in modified form appears at page 24 of petitioner's brief to this Court.

The Court of Appeals, however, declined to modify its previous holding based on a fundamental concept of law that the vessel could not be held for an accident which was proximately caused by the negligence of the longshoremen and denied a rehearing. In this connection, it stated:

> "A petition for rehearing is presented for our consideration on a theory of unseaworthiness which seems not to have been advanced in the trial court and has not heretofore been urged on this appeal. We find no such merit in this or any other contention as would warrant a rehearing. Accordingly, the petition for rehearing is denied."

Chief Judge Biggs who did not participate in the original appeal and who apparently relied on petitioner's revised account of what caused his accident filed a dissent in which he suggested a rehearing. It is apparent from the opinion of Judge Biggs that his version of the circumstances which gave rise to petitioner's accident was incomplete. It was based upon the assumption that when the injury occurred, the longshoremen were engaged in a normal unloading operation and that the proximate cause of the accident was not the negligent attempt of the longshoremen to extract a timber which they had caused to jam from its obstructed position but solely the incorrect positioning of the ship's boom.

Summary of the Argument.

a. While a vessel or its owner has a non-delegable duty to provide longshoremen with a seaworthy vessel and equipment, this warranty does not extend to accidents which are proximately caused by the negligent operation of seaworthy equipment by the fellow employees of the injured longshoreman. Nor does the concept of seaworthiness impose the requirement that the ship or its gear be fit for a purpose for which it is not furnished or that it take care of exigencies that are remote and unlikely. The criterion under the warranty of seaworthiness is reasonable fitness.

b. The traditional protection which has been afforded by the warranty of seaworthiness does not include and has never included the right to recover for the negligence of a fellow servant. It should not be used as an excuse to circumvent the legislative will which has given a remedy to longshoremen for injuries sustained under such circumstances.

c. Under the law, an appellate court may rightfully reject certain findings of the trial court when they are inconsistent with other findings of the trial court, are contrary to the uncontroverted probative evidence and are contrary to law. Mere speculation cannot be allowed to do duty for probative facts.

THE ARGUMENT

I

Since both Courts concurred that the proximate cause of the accident was the negligence of the longshoremen in the manner in which they were conducting the unloading operation, the Court of Appeals was correct as a matter of law in reversing the Trial Court.

The vessel has no quarrel with the decisions of this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot* v. *Hawn*, 346 U. S. 406; *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52; *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, and the decisions of lower courts which are the necessary outgrowth of the principles laid down in these decisions. It does not dispute that where some defect in the vessel or its equipment is the proximate cause of an accident, a vessel or its owner would be liable under the law. It also does not dispute that when a longshoreman is injured while he and his co-workers are using ship's appliances for a purpose for which they are intended or furnished, a vessel or its owner would be held liable under the doctrine of seaworthiness. These principles were and are applicable to seamen and have been applied to longshoremen since the landmark decision by this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

The vessel, however, disputes petitioner's contentions that the principles enunciated in those cases are applicable to him under the facts of this case or that it is a necessary corollary to those holdings that the protection afforded longshoremen under those decisions should be extended to petitioner.

It is a fundamental concept of law that before liability can attach, it is necessary that the act, omission or guilt of the party to be charged be the proximate cause of the injury. While it is true that in cases under the Federal Employers' Liability Act, 45 U. S. C. 51 et seq., and the Jones Act, 46 U. S. C. 688, liability can be found where the injury or death resulted "in whole or in part" from the negligence of a railroad worker's or the seaman's employer, this concept has no application in this case. *Pennsylvania Railroad Company* v. *Pomeroy*, 239 F. 2d 435, cert. denied 353 U. S. 950; *Nicholson* v. *Erie Railroad Company*, 2 Cir. (1958), 253 F. 2d 939. Those statutes specifically provide that liability flows where negligence is responsible "in whole or in part" for the casualty. *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 524. However, before a longshoreman or a seaman can recover for unseaworthiness, it must be proven that the unseaworthiness was the proximate cause of the accident. *Grillo* v. *United States*, 2 Cir., 177 F. 2d 904; *Freitas* v. *Pacific-Atlantic Steamship Company*, 9 Cir., 218 F. 2d 562, 564; *Reynolds* v. *Royal Mail Line*, 9 Cir., 254 F. 2d 55.

In holding that the negligence of the longshoremen which was the "proximate cause" or the "sole, active or primary cause" of the accident brought into play an unseaworthy condition for which the vessel would be liable to the petitioner under the principles enunciated in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396; and *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 2 Cir., 213 F. 2d 397, the trial court attempted to formulate a new theory of liability which is contrary to the doctrine of proximate cause.

In defining proximate cause, this Court in *Standard Oil Co.* v. *United States*, 340 U. S. 54, 58, said:

> "But the true meaning of that maxim is that it refers to that cause which is most nearly and essentially connected with the loss as its efficient cause."

In *Aetna Ins. Co.* v. *Boon*, 95 U. S. 117, 130, proximate cause was defined as follows:

> "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result."

In *Lanasa Fruit S. S. & I. Co.* v. *Universal Ins. Co.*, 302 U. S. 556, 562, this Court pointed out that in non-statutory cases, the doctrine of proximate cause does not vary. It stated:

> "It is true that the doctrine of proximate cause is applied strictly in cases of marine insurance. But in that class of cases, as well as in others, the proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result."

To the same effect, see *Atchison, Topeka & Santa Fe Railway Company* v. *Calhoun*, 213 U. S. 1, 7; *Milwaukee etc. Railway Co.* v. *Kellogg*, 94 U. S. 469; *The Santa Rita*, 9 Cir. (1910), 176 F. 890, 895; *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 136, cert. denied 341 U. S. 915.

In neither *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, nor in *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396, did this Court fashion a new rule of liability so that a vessel

or its owner would be liable if the proximate or the sole, active or primary cause of the accident was the negligence of the longshoremen in the manner in which they did their work. This contention was expressly rejected by the Court of Appeals in *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 2 Cir., 213 F. 2d 397, 401, when it said:

> "As for the manner in which the work was performed, and any resulting transitory conditions * * * which may have been unsafe, American's (the stevedore) assumption of control relieved Cyprien (the shipowner) of responsibility."

The decision in *Grillea* v. *United States*, 232 F. 2d 919, permits of no exception in this case. In that case, even though the longshoremen had placed the hatch cover improperly, the Court held in effect that the proximate cause of the accident was not the act of placing the hatch cover in place but the unseaworthy condition which this improper placement had created. The Court's reference to the fact that there was a lapse of time between the placement and the occurrence of the accident and the fact that the misplaced hatch cover had become as much a part of the 'tweendeck for continued prosecution of the work, as though it had been permanently fixed in place, clearly distinguishes the subject case from that case. The accident occurred to Grellia as a result of a condition of the vessel, whereas petitioner's injury resulted directly from a foolhardy use of the ship's equipment by his fellow employees.

The holding of the Court in *The Daisy*, 9 Cir. (1910), 282 F. 261, is particularly applicable here. It said at page 262:

> "For misuse the ship would not be liable. That the stevedore who held the hook was a fellow serv-

ant of libelant is also well established, and that the ship owner is not liable for the negligence of the fellow servant is equally well established."

Thus, in reversing the trial court, the Court of Appeals correctly held that the "gear was not proved to have been unseaworthy, neither was the setting of the cut-off device established as a legal cause of the accident which occurred."

II

The warranty of seaworthiness does not require that a vessel and its gear be fit for a purpose for which they are not intended or furnished. When so employed, there can be no liability for a breach of this warranty.

The duty of a shipowner to furnish a safe and seaworthy vessel and equipment does not mean that the vessel and its equipment must be fit to meet all contingencies and be safe in all respects regardless of the circumstances which may bring about the occurrence of an accident. The warranty of seaworthiness contemplates no more than that the vessel and its equipment be reasonably safe or fit when employed for the purpose for which they are intended or furnished. *Reynolds* v. *Royal Mail Lines*, 9 Cir. (1958), 254 F. 2d 55. This principle which forms the very core of the obligation of seaworthiness was reiterated by this Court in *Boudoin* v. *Lykes Brothers Steamship Co.*, 348 U. S. 336, when it said at page 339:

> "The warranty of seaworthiness does not mean that the ship can weather all storms. It merely means that 'the vessel is reasonably fit to carry the cargo' • • •."

Despite the fact that when it concluded as a matter of law that Nacirema's negligence in the manner in which it attempted to extract the timber from its obstructed position beneath the deck of the vessel was the sole, active or primary cause of the parting of the topping lift, it was also necessarily the trial court's finding that the ship's gear at the time was not being used for the purpose for which it was furnished or intended and should have dismissed the libel.

This was the only conclusion which was permissible under the facts of this case. In *Manhat* v. *United States*, 2 Cir. (1955), 220 F. 2d 143, cert. denied 349 U. S. 966, after reviewing the authoritative holdings of this Court as well as decisions of the lower courts, the Court of Appeals rejected the contention that a releasing gear for a life boat should have been so foolproof that it would have prevented the occurrence of an accident when shore workers accidentally released it and caused injury to one of their fellow employees. There, as here, the accident was brought about by the unanticipated act of a fellow employee. In denying that the warranty of seaworthiness extended to include such a contingency, the Court said at page 148:

> "The imposition of a requirement that a lifeboat be rigged to take care of exigencies as remote and unlikely as that which arose in this case would extend the scope of the warranty of seaworthiness beyond the limits set by the criterion of reasonable fitness."

The cases are legion that there is no basis for a finding of unseaworthiness when the ship's gear does not perform its intended function while it is being put to a use for which it is not intended. It would do violence to the

basic concept which gives rise to this warranty, *i.e.*, that the equipment be reasonably fit for the use for which it was intended, to hold a vessel liable under such circumstances.

In *Manhat* v. *United States*, 2 Cir., 220 F. 2d 143, cert. denied 349 U. S. 966, an attempt was made to extend the warranty of seaworthiness to include the requirement that the vessel's gear be so foolproof that it would prevent the occurrence of an accident even when the equipment was not designed or furnished for such purpose. In rejecting this contention, the Court of Appeals said:

> "• • • Although the doctrine of seaworthiness which is said to impose a warranty on the shipowner that the ship, its equipment and appliances are not defective has, in recent years, been extended to include within the scope of the warranty such things as appliances brought on board by an independent contractor to be used by him in repairs aboard ship, Alaska S. S. Co., Inc. v. Petterson, supra, and the adequacy and competency of its crew, Overseas Tankship Corp. v. Keen, 2 Cir., 1952, 194 F. 2d 515, certiorari denied 1952, 343 U. S. 966, 72 S. Ct. 1061, 96 L. Ed. 1363, it has never been held to require the best possible equipment or to impose an insurer's liability for any and all injury to those working on shipboard, Berti v. Compagnie De Navigation Cyprien Fabre, 2 Cir., 1954, 213 F. 2d 397; see Doucette v. Vincent, 1 Cir., 1952, 194 F. 2d 834. As this Court held very recently, '(I)t requires only that equipment be reasonably fit for the use for which it was intended • • •.' Berti v. Compagnie De Navigation Cyprien Fabre, supra (213 F. 2d 400). In every case in which recovery for unseaworthiness has been al-

lowed, the trial court or the appellate court, in the exercise of its special admiralty power, found that either the ship or its appliances or equipment was not thus fit."

In *Berti* v. *Compagnie De Navigation Cyprien Fabre*, 2 Cir. (1954), 213 F. 2d 397, in defining the basic principles on which the warranty of seaworthiness is founded, the Court of Appeals said at page 400:

> "But it has never been held that it requires the best possible equipment, see Doucette v. Vincent, 1 Cir., 194 F. 2d 834, *or that the crew will be free from negligence.* * * * *It requires only that equipment be reasonably fit for the use for which it was intended, and that seamen be equal in seamanship to the ordinary men in the calling.* * * * If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien." (Italics supplied.)

And in *The Daisy*, 9 Cir. (1922), 282 F. 261, the Court significantly stated at page 262:

> "For misuse the ship would not be liable. That the stevedore who held the hook was a fellow servant of libelant is also well established, and that the ship owner is not liable for the negligence of the fellow servant is equally well established." (Citing cases.)

To the same effect is *The Silvia* (1898), 171 U. S. 462; *Doucette* v. *Vincent*, 1 Cir. (1952), 194 F. 2d 834; *Freitas* v. *Pacific-Atlantic Steamship Company, Inc.*, 9 Cir. (1955), 218 F. 2d 562.

It would also be repugnant to the basic principles underlying the warranty of seaworthiness to extend it to include accidents arising from the negligent acts of a longshoreman's fellow employees. *Berti* v. *Compagnie De Navigation Cyprien Fabre, supra,* 213 F. 2d 397, 400; *The Daisy, supra,* 282 F. 261-2. The failure by a seaman to use the ship's appliances properly was never a basis for liability under the general maritime law. *John A. Roebling's Sons Co.* v. *Erickson,* 2 Cir. (1919), 261 F. 986; *The Santa Barbara,* 2 Cir. (1920), 263 F. 369. To urge that a longshoreman should nonetheless be accorded such rights would be inconsistent with the principles under which this Court extended a seaman's traditional protection to a longshoreman. In *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 99, 100, it was said that while the shipowner was at liberty to parcel out his work to shore labor, he, however, was not at liberty to discard his traditional responsibilities; and, therefore, a longshoreman, since he was incurring a seaman's hazards, should be entitled to the same protection a seaman enjoyed. The seaman's traditional and statutory protections, however, did not allow indemnity for injuries sustained through the negligence of the Master or any member of the crew. These traditional and statutory protections were summarized by this Court in *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130, 134, as follows:

> "By the general maritime law of the United States prior to the Merchant Marine Act, a vessel and her owner were liable, in case a seaman fell sick, or was wounded in the service of the ship, to the extent of his maintenance and cure, whether the injuries were received by negligence or accident, and to his wages, at least so long as the voyage was continued, and were liable to an indemnity for injuries received by a seaman in consequence of

the unseaworthiness of the ship and her appliances; *but a seaman was not allowed to recover an indemnity for injuries sustained through the negligence of the master or any member of the crew.* The Osceola, 189 U. S. 158, 175, 47 L. ed. 760, 764, 23 S. Ct. Rep. 483; Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 380, 62 L. ed. 1171, 1175, 38 Sup. Ct. Rep. 501, 19 N. C. C. A. 309; Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 258, 66 L. ed. 927, 929, 42 Sup. Ct. Rep. 475.

By § 33 of the Merchant Marine Act, as heretofore construed, the prior maritime law of the United States was modified by giving to seamen injured through negligence the rights given to railway employees by the Employers Liability Act of [April 22], 1908 [35 Stat. at L. 65, chap. 149, U. S. C. title 45, § 51], and its amendments, and permitting these new substantive rights to be asserted and enforced in actions in personam against the employers in Federal or state courts administering common-law remedies, with the right of trial by jury, or in suits in admiralty in courts administering maritime remedies, without trial by jury. Panama R. Co. v. Johnson, 264 U. S. 375, 68 L. ed. 748, 44 Sup. Ct. Rep. 391; Engel v. Davenport, 271 U. S. 33, 70 L. ed. 813, 46 Sup. Ct. Rep. 410; Panama R. Co. v. Vasquez, 271 U. S. 557, 70 L. ed. 1085, 46 Sup. Ct. Rep. 596; Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 71 L. ed. 1069, 47 Sup. Ct. Rep. 600." (Italics supplied.)

Thus, not until 1920 were seamen permitted to sue the shipowner for negligence and this only by reason of an Act of Congress (46 U. S. C. 688). The right to sue for negligence of a fellow employee, as the petitioner attempts here, was never a part of a seaman's traditional

protection. Insofar as longshoremen are concerned, they can have no greater right than seamen had and they are precluded by statute from suing for negligence of a fellow employee. For a time, longshoremen were permitted to sue their employer for negligence in not providing safe working conditions. In 1926, this Court extended to longshoremen the additional benefits of the Jones Act, among which was the right to sue for negligence of a fellow seaman. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50. Thereafter, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., Sections 901 *et seq.* The longshoremen accepted this workmen's compensation act which afforded them a remedy on the basis of liability without fault in lieu, among other things, of the right to sue for the negligence of their fellow servants. Seamen, however, preferred to remain outside and take the risks of the Jones Act (46 U. S. C. 688), *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, and that still remains the basis of their actions for negligence of a fellow servant.

To urge, as petitioner does at page 9 of his brief, that if the warranty of seaworthiness is not extended to include the negligence of longshoremen, an injured longshoreman may be left without relief, may be misleading. He always can have the protection of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C., § 901 *et seq.*). It cannot be disputed that Congress has the right to alter or revise the maritime law and relegate a worker to the remedies of the Compensation Act. *Crowell* v. *Benson*, 285 U. S. 22, 39-41. In fact, it was the purpose of Congress in enacting this compensation law to provide the longshoremen with a right to recovery for liability without fault similar in respect to that which was accorded seamen under the general maritime law. *Crowell* v. *Benson*, 285 U. S. 22, 41; *Cudahy Packing Co.*

v. *Parramore*, 263 U. S. 418. Significantly, the Compensation Act was also designed to distribute the loss among the industry which is served by the longshoremen. *Alaska Packer's Association* v. *Industrial Acci. Com.*, 294 U. S. 532; *Baltimore & P. S. B. Co.* v. *Norton*, 284 U. S. 408, 414.

What petitioner's contention, therefore, really amounts to is a belated plea on his behalf that this Court circumvent the Longshoremen's and Harbor Workers' Compensation Act and provide him with a remedy which he considers (33 U. S. C. 901 *et seq.*) more favorable than that which Congress enacted. On several occasions, this Court has expressed its disapproval of efforts to circumvent legislative enactments because they may not be as desirable as other remedies appear to be. In *De Zon* v. *American President Lines* (1943), 318 U. S. 660, 672, it pointed out that it was not for this Court to say whether the legislative policy was wise or not, nor was it this Court's function to circumvent the legislative will and create a theory of liability which would permit the petitioner to by-pass the rights which the legislature deemed fit to fix. This is all the more true when the legislation was affected with a public interest.[4] In such an instant, this Court remained firm in its position that it had to be adhered to even though it might work a hardship in some cases. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356.

To saddle the vessel with the responsibility for the negligence of petitioner's fellow employees would also be a most unrealistic approach to the problem of accident prevention as well as the principles on which liability under our law is predicated. The responsibility for an accident

[4] The Compensation Act is a statute affected with a public interest. *Baltimore & P. Steamboat Co.* v. *Norton*, 284 U. S. 408, 414.

should rest with those who have the power to prevent it. To do otherwise begets recklessness, carelessness and neglect. Cf. *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85, 97.

The Court of Appeals committed no error in reversing the trial court. It did nothing more than correct the misapprehension under which the trial court was laboring, *i.e.*, that the warranty of seaworthiness required not only that the vessel and its equipment be reasonably safe for their intended purpose but that they also be capable of withstanding all hazards, no matter what their source might be.

III

The Court of Appeals did not absolve the vessel on the relinquishment of control theory.

Despite petitioner's protestations to the contrary, the Court of Appeals did not absolve the vessel under the so-called "control" doctrine which was repudiated by this Court in *Petterson* v. *Alaska S. S. Co.*, 347 U. S. 396. It did no more than place the finding of the trial court, with which it concurred, that the "proximate cause" or the "sole, active or primary cause" of the parting of the topping lift was the negligent manner in which the longshoremen attempted to extract the timber from beneath the deck of the vessel in its proper perspective. If it dealt with any type of control, it was only that measure of control which petitioner concedes (p. 13 of his brief) Nacirema did possess in the sense that its employees were handling the unloading gear at the time of the accident. It is such control, according to the Court of Appeals in *Berti* v. *Compagnie De Navigation Cyprien Fabre*, 2 Cir., 213 F. 2d 397, 400, 401, that relieves the shipowner of

responsibility. In this connection, it pointed out at page 400:

> "As we said in Gallagher v. United States Lines Co., 2 Cir., 206 F. 2d 177, 179, certiorari denied 346 U. S. 897, 74 S. Ct. 221, 'a general ability to control the work in order to insure that it is satisfactorily completed in accordance with the requirements of the contract does not of itself make the hirer of an independent contractor liable for harm resulting from negligence in conducting the details of the work.' * * * And had there been, the question would properly have been one for the jury. We are clear that since control of the details of the operation was left to American, Cyprien cannot be held for negligence in the latter's performance."

Certainly, even in its extremest form, a shipowner's control could not embrace the acts of the longshoremen in their operation of the ship's equipment. In stating that there was "nothing in the record which suggests that such an eventuality was reasonably to be feared or anticipated" (R-114), the Court of Appeals made it clear that it was not relying on the "repudiated control concept." It was merely taking the correct approach, that seaworthiness could not possibly contemplate any liability where there was no reason to fear that the ship's gear would be used in such a manner that it would be subjected to a stress or strain which a normal operation would not entail. This lack of fear necessarily existed because there was no reason to expect that the longshoremen would be so foolhardy as to try to extract a timber after they had caused it to become jammed by continuing to apply power to the winch and was buttressed by the presumption that in doing their work the longshoremen would do it in a proper and safe manner. Certainly, it was not unreasonable to

expect that in discharging the cargo, the longshoremen would not cause a timber to become jammed and that when movement of the timber had become effectively blocked, they would continue to apply the power to the winch until something broke. It was reasonable to assume that when this occurred, the winch operator would stop the winch either by putting the control lever in neutral or turning the switch which had been shown to him when he started to work on board the vessel.

Petitioner's reference to decisions of this Court as well as those of some lower courts where longshoremen have been injured because of defects in the ship or its gear furnishes no authority for the allowance of a recovery here. In each instance, the proximate or primary cause of the accident was such defect in the vessel or its equipment. In each instance, too, the accident occurred while the vessel or its equipment were being used for the purpose for which they were furnished and intended. In each instance, it was found that they failed to measure up to the prescribed standard. None of these circumstances, however, fits the subject case.

Under the facts of this case, those decisions cannot be related to the occurrence in question, unless the fundamental fact that the overstrain on the topping lift was caused by the continued application by the longshoremen of power to the ship's winch after the timber became jammed be omitted. This cannot be done here because it would require the substitution of new findings for those which were made by the Courts below. *Just* v. *Chambers*, 271 U. S. 220, 227, 228. Nor is it the function of this Court to give petitioner a new trial. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163.

IV

Where the Trial Court makes findings which are inconsistent with each other and are not based on probative evidence and its conclusions resulting therefrom are contrary to law, the Court of Appeals may properly reverse the Trial Court and make new findings consistent with the probative facts and the law.

In requesting a reversal of the Court of Appeals, petitioner states that he is not seeking a review on the ground that the Court of Appeals "chose certain evidence as opposed to other evidence, but because in reversing the findings of the trial court it adopted a theory which is not based upon any evidence in the record, and, in fact, is in direct conflict with all the evidence in the record." In effect, petitioner concedes that if there is any evidence to support the finding of the Court of Appeals, his entire point should fail.

In this connection, much is attempted to be made of the fact that after the Court of Appeals stated that *hoisting gear of the kind in suit is rated to lift a load not more than one-fifth of the strength of the cable itself*, it further added that "*gear rated to handle a three ton load utilizes cable adequate to withstand a strain of fifteen tons.*" Does petitioner mean by this that if the Court of Appeals had said that gear rated to handle a three ton load utilizes cable adequate to withstand a strain of less than 15 tons, *i.e.*, 14 tons, 10 tons, etc., its reasoning would have been correct? All that the Court of Appeals was saying here was that since the cable was adequate to withstand more than six tons, it was not improper. It did in effect so state when it said that "subjecting the cargo runner to a strain of six tons did not in itself create any undue risk

of breakage." It is evident that a strain of six tons on a cable having a breaking point of fifteen tons creates no undue risk of breakage. The difference between safe working load and the breaking load is a cushion or a safety tolerance. It does not mean that the gear will start breaking when the safe working load is exceeded. It is only when the strain approaches the breaking point that distortion in the wire begins to take place and is, in turn, followed by damage to the component wires of the rope. A wire rope unlike twine or wood is actually a machine having many moving parts. Each time the rope bends or straightens, the wires in the strands slide on each other and only when the breaking point is reached that they begin to deteriorate. In disputing the reference of the Court of Appeals to cable adequate to withstand a strain of fifteen tons, petitioner overlooks the vital fact that the breaking strain or tensile strength of the wire rope which was used in the topping lift was computed at 19,600 pounds. Since the topping lift was in a double purchase arrangement, it would be stronger by about 50% (R-24-25). This would give it a breaking strength of more than fifteen tons.

Nowhere in the record or in any of the findings of the trial court does it appear that the breaking strength of the topping lift was fifteen tons. The fact that the trial court found that the topping lift parted under a strain of between 17 and 21 tons further amply demonstrates the fallacy of petitioner's contention that the Court of Appeals committed reversible error when it made reference to "fifteen tons."

While it is true that the expert Stewart and the witness Byrne both testified that the safe working load of wire rope is one-fifth of its tensile strength, both were in

agreement that the load which was suddenly applied to the topping lift by the manner in which the winch driver operated the winch amounted to at least 42,300 pounds (R-30, 48). Thus, it cannot be inferred from the testimony of either of these witnesses that the breaking or tensile strength of the topping lift in question was fifteen tons even though they testified that the safe working load of wire rope is one-fifth of its breaking load. Even the expert Simons found the breaking load to be greater than fifteen tons, *i.e.*, 17 tons (R-30-31).

These are the real facts which gave rise to the mathematical formula of the Court of Appeals, as it was expounded by the experts Stewart and Simons (IR 4-IR 7). The record amply demonstrates its validity and accuracy. The level of the breaking point clearly was not used as the safe capacity of the gear. Petitioner's entire argument arises from the erroneous assumption that the breaking load must always be equivalent to five times the designated safe working load, no matter what its breaking load may be computed to be. It is evident that safe working load does not always mean that a force of five times the safe working load of gear will necessarily cause such gear to break. Nor does it mean that a strain in excess of the safe working load constitutes a danger. Safe working load is merely a limitation on the recommended load to which a unit of the gear should be subjected so that there may be a maximum safety tolerance or cushion (R-87-89). Since the trial court found that the topping lift was adequate and proper for the loads for which the rest of the gear was designed and intended, the only conclusion that was possible here was that in setting the circuit breaker on the electric motor of the winch to cut off at six tons, no undue risk of breakage was created.

On the other hand, even if petitioner's line of reasoning should be adopted, the facts nonetheless support the position taken by the Court of Appeals. The trial court noted that inspection by the ship's Chief Officer after the accident occurred showed that the cut-off device had functioned. If, as petitioner contends, the breaking strain is five times the safe working load, it leads to only one conclusion and that is that when the strain on the winch reached 6 tons and the cut-off functioned, the strain on the topping lift was built up to 30 tons when the topping lift broke. No other conclusion is possible because if the topping lift broke before the cut-off device functioned, then the strain on the winch would have been relieved and the point at which the cut-off device was set to function would not have been reached. Conversely, if the cut-off functioned before the topping lift broke, then it would have prevented any further strain from building up on the topping lift. Thus, no matter how the Court of Appeals chose to describe the situation which was created, it is evident that the topping lift broke because of the unanticipated and unreasonable strain which the longshoremen imposed on the ship's gear by negligently applying power to the ship's winch after the movement of the timber was effectively blocked. Since both the winch stopped and the topping lift broke, the conclusion is inescapable that this could not have occurred unless both were subjected to a strain of 30 tons. Such a strain certainly could not be reasonably expected or anticipated from a normal lifting of a 3-ton draft. The setting of the cut-off device, thereore, could not be improper.

The Court of Appeals furthermore was required to reverse the trial court because of the Court Guard regula-

tion[5] and the uncontroverted evidence that the vessel had followed standard procedure. This Court has held that a non-compliance with such a regulation is a basis for liability. *Kernan* v. *American Dredging Company*, 355 U. S. 426, would seem to be a necessary corollary that compliance therewith should be sufficient to absolve from liability. The trial court certainly had no right to let speculation do duty for probative facts. *Galloway* v. *United States*, 1943, 319 U. S. 372.

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[5] TABLE 111.45-20 (b2).—*Maximum rating or setting of motor branch circuit protective devices for motors not marked with a code letter indicating locked rotor KVA.*

Type of motor [3]	Percent of full-load-current [1] [2]		
		Circuit breaker setting	
	Fuse rating	Instantaneous type	Time limit type
Single-phase, all types	300	...	250
Squirrel cage and synchronous (full-voltage, resistor and reactor starting)	300	...	250
Squirrel cage and synchronous (autotransformer starting):			
Not more than 30 amperes	250	...	200
More than 30 amperes	200	...	200
High-reactance squirrel cage:			
Not more than 30 amperes	250	...	250
More than 30 amperes	200	...	200
Wound rotor	150	...	150
Direct current:			
Not more than 50 horsepower	150	250	150
More than 50 horsepower	150	175	150

[1] For certain exceptions to the values specified see paragraphs 111.45-5(c), 111.45-20(b), and 111.45-20(g).

[2] Synchronous motors of the low-torque low-speed type (usually 450 r. p. m. or lower) such as are used to drive reciprocating compressors, pumps, etc., which start up unloaded, do not require a fuse rating or circuit breaker setting in excess of 200 percent of full-load current.

[3] For motors marked with a code letter, see table 111.45-20(b1).

Petitioner's assertion that this regulation does not refer to winches expressly or impliedly is contrary to the uncontroverted testimony of two experts who testified in this matter as well as to the regulation itself. In this connection, the expert Simons stated:

> "The Court: Then there is no fixed design of the cut-off mechanism of an electric winch aboard ship which precludes its setting at a variety of cut-off stages, is there?
>
> The Witness: Well, the Maritime Commission has certain maximum amounts of current that they specify you cannot exceed. You cannot exceed a certain current in the setting. Outside of that I myself know of no special setting except what is considered good practice in the field.
>
> • • • • •
>
> The Court: Now, what is the name of the regulation to which you say prescribes the quantity of current at which the winch, the maximum quantity of the current, the minimum quantity of current at which the winch will cut off?
>
> The Witness: I do not know the exact name of the regulation. It is a Maritime Commission regulation or administration, as it is now called. I know something about what the regulation states, that it will allow a maximum of three times the normal load current to run through the cut-off before it cuts off but no more. In other words, a cut-off cannot be set on any ship that comes under the Maritime Administration, so that the setting will allow over three times the normal load current to pass through the circuit breaker.
>
> • • • • •

Q. Is there any—apart from any government regulation—any prescribed standard of design which can be expressed in a percentage of the capacity which the winch is designed to lift for the functioning of the automatic cut-off device of an electric winch? A. I don't know" (R-45-46).

• • • • •

"Q. You have testified that the Maritime Administration has regulations which provide that the cut-off be set at three times the normal load, isn't that correct—for normal load current? A. Yes, that is maximum, by the way.

Q. You cannot go beyond that? A. No" (R-47).

• • • • •

"Q. Mr. Foley, are you familiar with electric winches that have an electro magnetic overload relay? A. An electric magnetically actuated, yes. They are instantaneous type relays.

The Court: What do you mean by instantaneous type?

The Witness: When the current reaches the setting they go out. A thermo type is usually known as an inverse time limit relay.

The Court: So that by reason of the distinction you get an instantaneous shut-off when the electro magnetic field has been created.

The Witness: To the setting of the relay.

• • • • •

The Court: Objection sustained. Do you know what the maritime regulations are respecting this question?

The Witness: I do.

Q. What are they?

• • • • •

The Witness: For direct current motors under 50 horsepower, 250 per cent of full load current. If it is an instantaneous type relay, if it's a time limit relay it is 150 per cent.

The Court: Say that again slowly. 250 per cent——

The Witness: Of the full load current of the motor when the relay is an instantaneous type relay.

The Court: And this was an instantaneous type we are talking about?

The Witness: That is correct.

The Court: In other words, it takes 250 per cent of the safe load.

The Witness: Of the full load current of the motor.

The Court: Before it shuts off.

The Witness: Before it trips, yes, and there are reasons for that" (R-49-50).

• • • • •

The only matter in the record which might be considered as contrary to this Coast Guard regulation and the testimony of these experts was an opinion by the witness Byrne who was not offered as an electrical engineer and was not familiar with the mechanics or electronics of a cut-off device (R-95). His opinion, therefore, had no probative value. *Galloway* v. *United States* (1943), 319 U. S. 372; *Sturgis* v. *Clough*, 68 U. S. 1 Wall 269.

Petitioner's self-serving statement that this regulation does not refer to ship's winches expressly or impliedly

but has to do with current supplied to lights and water coolers, etc., not involving any strain on gear as is involved in the operation of a ship's winch, is not only misleading but is contradicted by the regulation itself. Footnote 2 under this regulation specifically excludes the type of appliances which petitioner says are included. It would seem incongruous for this regulation to refer to motors of up to 50 horsepower and over if it was dealing with motors which related only to lights, water coolers, etc. Unimportant as it may seem, it should also be noted that petitioner seeks also to make a distinction by asserting that this regulation does not refer to winches. It does refer to electric motors on ships and it was an electric motor which powered the winch in this case as it does in all instances.

Petitioner's contention that the Court of Appeals reasoned contrary to the evidence is accordingly incorrect and should therefore be rejected in toto.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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